NO. 48798-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

RICHARD KIRKLAND,

Appellant.

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# BRIEF OF APPELLANT

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### *Assignment of Error*

1. Trial counsel's failure to object when (1) the state repeatedly introduced inadmissible, prejudicial hearsay and (2) when the state called upon its key witness to comment on his own credibility denied the defendant effective assistance of counsel.

2. This court should not impose costs on appeal if the state substantially prevails.

### *Issues Pertaining to Assignment of Error*

1. Does a trial counsel's failure to object when (1) the state repeatedly introduces inadmissible, prejudicial hearsay and (2) when the state calls upon its key witness to comment on his own credibility deny that defendant effective assistance of counsel when these failures undermine confidence in the jury's verdict?

2. Should an appellate court impose costs on appeal if an indigent client has no present or future ability to pay those costs?

## STATEMENT OF THE CASE

### *Factual History*

On October 23, 2015, at about 7:00 pm Leslie Kitt and Tricia Nace were finishing up her shifts as sales clerks at the Catherine's Plus clothing store located in a strip mall at 10406 Silverdale Way NW in Silverdale, Washington. RP 32-33, 36-38. At the time there were no customers or other employees in the store. RP 36-38, 59-60. After folding clothes Ms Nace went in the back to use the restroom, leaving Ms Kitt the only person in the store. *Id.* Shortly after Ms Nace went to the back, Ms Kitt saw what she believed was a single male she thought might be Hispanic wearing something over his face and sun glasses enter the store and walk up to her. RP 38-40. According to Ms Kitt, the person was about five foot five inches tall and was wearing black gloves and a dark jacket with the hood up over his head. RP 52-55. As this person walked up he pulled a gun out of his pocket, pointed it at Ms Kitt and ordered that she hand over money. RP 38-40.

Ms Kitt responded by attempting to log into one of the two registers behind the sales counter located in the center of the store. RP 44-48. Although she had a hard time getting into the first register, she eventually got it open and put cash and coins into a small Catherine's bag, telling the robber that Ms Nace would soon be coming out of the restroom. *Id.* She told him this because she didn't want Ms Nace to startle the robber and put herself in

danger. *Id.* About that time Ms Nace walked out from the bathroom. RP 52. As she did the robber grabbed the bag and ran out of the store. RP 53-55. Ms Nace saw him, later giving the same description as Ms Kitt. RP 63-65. Ms Nace's description was that the robber was a few inches taller than Ms Kitt, who is five foot tall. RP 53, 64. They then locked the door, called 911 and called the store manager. RP 55-57, 66-67.

Within a few minutes a police officer arrived and took Ms Kitt and Ms Nace's statements. RP 31-35. A K-9 officer also responded to the store and had his dog follow what the officer believed was the robber's scent from the front door of the store out to a wooded area behind the building. His dog eventually then lost the track. RP 126-140.

Later that evening the police developed information that a 15-year-old by the name of Nicholas Braghetta had information about the robbery. RP 77-78, 96-97. At about 4:00 am the next morning they went to his home, woke him up and took him to the police station for an interview. RP 101, 177-178. Although he initially denied any knowledge of the robbery, he eventually told the police the following story. RP 193.194. According to Mr. Braghetta, during the prior evening he was in the McDonalds on Silverdale Way NW near the strip mall where Catherine's is located. RP 165-167. While in the McDonalds a person unknown to him walked up, identified himself as "EJ" and began a conversation. *Id.* This person then showed Mr.

Braghetta a handgun and stated that he was going to do a robbery at one of the stores, maybe the Macy's. *Id.* Mr. Braghetta claimed that he told the person that the idea was stupid. *Id.* He also stated that he did not believe the gun was real because when "EJ" showed it to him he tapped it on a table and it didn't sound like it was made of metal. *Id.*

Mr. Braghetta went on with his story to the police and stated that this person then walked out of the McDonalds with Mr. Braghetta following. RP 169-170. As they walked in front of the Catherine's store, the person put on a ski mask, pulled out the gun, said wait a minute and went into the store to rob it. *Id.* Mr. Braghetta told the police that at this point he fled the area. *Id.* In his statement to the police Mr. Braghetta claimed that the robber was wearing a black jacket, black pants and black shoes. RP 170. He later identified the defendant as the stranger who walked up to him at the McDonalds, showed him what Mr. Braghetta believed was a fake gun, told him that he was going to commit an armed robbery, walked over to the Catherine's store and went in to rob it all with Mr. Braghetta with him and watching. RP 165-166.

Mr. Braghetta also claimed that after the robbery he called his uncle, who picked him up and took him to a nearby Wendy's. RP 173-174. According to Mr. Braghetta, a person by the name of Nicholas Galloway was also in the car and that when they went to Wendy's the defendant walked up

wearing different clothes and asked them for a ride. RP 173-176.

The police later executed a search warrant at a home where the defendant shared a bedroom with his girlfriend. RP 152-156, 210-218, 232-235. Inside the bedroom the police found some black gloves in a laundry hamper, a leather handgun holster, a safe with a stolen checkbook in it, and a pair of shoes with someone's stolen prescription drugs in it. RP 109-220, 232-236. After executing the warrant the police arrested the defendant. RP 91. The police also spoke with the defendant's girlfriend's brother, who also lived in the home. RP 202-203. He reported that on one occasion he had walked through the bedroom the defendant shared with his sister and saw a plastic gun on the floor which he picked up and handled for a moment. RP 204-206.

***Procedural History***

By information originally filed October 20, 2015, and later amended, the Kitsap County Prosecutor charged the defendant Richard Kirkland with one count of first degree robbery, one count of possession of a stolen access device, and once count of third degree possession of stolen property. CP 1-7, 26-32. According to the "Defendant's Identification Information" on both the original and the amended information, the defendant is a black male born on November 21, 1994, he is five foot ten inches tall, and he weighs 170 pounds. CP 3, 29.

This case later came on for trial before a jury which the state called 12 witnesses, including the store clerk's Leslie Kitt and Tricia Nace, Nicholas Braghetta, six investigating officers, as well as the owner of the stolen checkbook and the owner of the stolen pill bottle. CP 31-248. These witnesses testified to the facts set out in the preceding factual history. *See* Factual History, *supra.* In addition, during their testimony, both Ms Kitt and Ms. Nace stated that the robber was about five foot five inches tall. RP 29. Ms Kitt's testimony on this issue was as follows:

> Q. Can you describe the suspect or the robber's stature or size?
>
> A. He was probably about 5'5".
>
> Q. And how tall are you?
>
> A. About five foot.
>
> Q. Okay. So safe to say you would have been looking up to him?
>
> A. Yes, slightly up.

RP 29.

On redirect Ms Kitt testified that the robber's height could have been taller or shorter "by a few inches." RP 57. Following Ms Kitt's testimony, Ms Nace took the stand and testified that when she returned from the bathroom she saw the robber run out of the store. RP 57. According to Ms Nace, the robber was "little bit taller than Leslie." RP 64.

In addition, although the state had custody of the gloves taken from

the defendant's bedroom and later offered them into evidence, the prosecutor did not show them to either Ms Kitt or Ms Nace and did not ask either if they looked like the gloves the robber was wearing. RP 36-58, 58-68. Neither did the prosecutor ask either witness if the defendant was anywhere near the height of the robber or whether or not the defendant appeared anything like the person who robbed the Catherine's store. *Id.*

On a number of occasions during trial the state, without defense objection, asked three different investigating officers to tell the jury what a number of third parties told them about the robbery and the facts surrounding that event. RP 77-78, 85, 96-97, 140, 144. The first of these investigating officers was Detective Laurie Blankenship. RP 70-92. The following exchange took place during her direct examination:

> A. Nicolas Braghetta shared information with us that was consistent with what was reported by the victim at Catherine's store and provided the same clothing description as the victim at the Catherine's store provided to us as well.
>
> Q. Why was that significant?
>
> A. Because that just led to credibility that, you know, he saw this person in these clothes, and this matches the same description that Catherine's store had provided – victim had provided to us.
>
> Q. Was he able to identify who was wearing those clothes?
>
> A. Yes. He said EJ was wearing those clothes.
>
> Q. And did he provide any further information on the identity, or how did – how did you determine who EJ was?

A. We found that little earlier on when Nicolas Braghetta got into the car with his Uncle Marty, and he told him about a conversation he had had with a subject named EJ and what the plans EJ had described to him, what he was going to do.

RP 77-78.

In addition, the state then went on to ask Detective Blankenship about what the defendant's girlfriend had told them when they interviewed her. RP 85. The following gives that testimony:

Q. Okay. So what did you do next, if anything?

A. We finished up the search warrant, and I think we secured for the night. No, I'm sorry. Let me think.

No, we did not secure for the night. After that, Detective Jennifer Rice and I went to Wendy's restaurant to talk to Kirkland's girlfriend.

Q. Okay. And without relaying what she said to you, did you learn anything from that interview that aided in your investigation?

A. Yes, I did. I spoke to her outside of the restaurant and back by a dumpster, Detective Rice and I, and what she disclosed to us was she had seen Kirkland with a gun, she described it as not a real gun, and she said her brother had also seen this gun inside the bedroom as well.

RP 85.

The defense did not make an objection in either of these exchanges.

RP 85.

The second of the investigating officers was Detective Lisa Gundrum. RP 93-110. During her direct examination the state asked her to tell the jury what Nicholas Galloway told her during her investigation. RP 96-97. This

exchange went as follows:

> Q. Okay. And what information did you receive from that interview, if anything, that aided in your investigation?
>
> A. He indicated that he had been present during the conversation of several other people and talking about whatled up to the robbery. And then subsequently they went to a Wendy's store in Silverdale, and they actually – when they arrived at that Wendy's, the suspect was standing at the Wendy's as well. So I don't know how much more detail you want me to go into at that point.
>
> Q. Did he lead you to – did he provide you any follow-up information, addresses, names, descriptions, anything that would – that you took into consideration in continuing your investigation after that?
>
> A. He had been – Nicolas had been hanging out with another male named Marty Major at that – at that time, as well as Marty's 15-year-old nephew, and that – the whole conversation about the robbery was between those three. Those three went to the Wendy's together.
>
> Nicolas felt very uncomfortable continuing on. Marty and the 15-year-old and the defendant got into Marty's vehicle, and they drove away. So Nicolas was able to provide us with the vehicle information, the description, the direction of travel, what the suspect was wearing – or the defendant was wearing, those types of things.
>
> Q. And at what point did he make the 911 call?
>
> A. What he explained to me was that he felt in fear of the defendant, didn't want to go with him, understood that there was a gun involved, a robbery. He didn't want to beinvolved in it. So when the three – when the other three drove away, he went into the Wendy's, feared that the defendant would come back, and he knew that he had a gun. So he ended up walking into a nearby field, and at that point, he made the 911 call.

RP 95-97.

As with Detective Blankenship's testimony, the defense did not make an objection to any of this evidence. RP 93-110.

The third of the investigating officers was Deputy Joseph Hedstrom. RP 122-151. During his direct examination the following exchange took place concerning Detective Blankenship's conversation with a person by the name of Nicholas Galloway, who did not testify at trial. RP 140.

> Q. What information was that?
>
> A. He said he was in a vehicle in the TJ Maxx parking lot, learned of the robbery and that the suspect had ran up to Wendy's. They drove up there, and the suspect was standing outside.

RP 140.

In addition, during his direct evidence Deputy Hedstrom also told the jury that Nicholas Braghetta's uncle also corroborated his nephew's and Nicholas Galloway's claim that they saw the defendant after the robbery and gave him a ride. RP 144. This exchange went as follows:

> Q. Okay. And did you receive any information that directed your investigation after that?
>
> A. Yes. Marlin had said he had dropped the suspect and Marty off at a house on McWilliams.
>
> Q. Did you have a name for the other person?
>
> A. At that time, I want to say that he was identified as EJ.
>
> Q. Okay. And were you able – later able to determine who EJ was?

A. Yes.

Q. How did you determine that?

A. Through interviews with Marty and I think Marty's nephew.

RP 144.

Neither of these exchanges between the state and Deputy Hedstrom garnered an objection from the defense. RP 140, 144.

Finally, on redirect, the prosecutor asked Mr. Braghetta, again without defense objection, to tell the jury whether or not he was telling the truth in his testimony. RP 197. This exchange went as follows:

Q. Nick, is it easier for you to remember the truth or to remember a lie?

A. It's easier to remember the truth.

Q. Okay. So you don't remember everything that you told law enforcement that night; is that right?

A. Uh-huh.

Q. And you testified that -- that some of it was a lie?

A. Yeah.

Q. But you remember the facts that you testified to today?

A. Yeah.

Q. And is what you told us today the truth?

A. Yes.

RP 197.

After the state presented its witnesses and rested the defense rested without calling any witnesses. RP 248, 251. The court then instructed the jury without objection from either party. RP 252-257, 258-279. Following argument, during which neither party voiced an objection, the jury retired for deliberation. RP 271-299. The jury later returned verdicts of guilty on all counts. RP 302-306. The court thereafter sentenced the defendant within the standard range for each offense, after which the defendant filed timely notice of appeal. RP 3/25/16 1-8; CP 78-88; 91-93.

## ARGUMENT

### I. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN (1) THE STATE REPEATEDLY INTRODUCED INADMISSIBLE, PREJUDICIAL HEARSAY AND (2) WHEN THE STATE CALLED UPON ITS KEY WITNESS TO COMMENT ON HIS OWN CREDIBILITY DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A reasonable probability is a

probability sufficient to undermine confidence in the outcome." *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, petitioner claims ineffective assistance based upon trial counsel's failure to object when the state (1) repeatedly elicited prejudicial, inadmissible hearsay, and (2) when the state called upon its critical witness to comment on his own credibility denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. These failures undermine confidence in the jury verdict in this case and thereby constituted ineffective assistance of counsel. The following sets out these arguments.

***(1) Trial Counsel's Failure to Object When the State Repeatedly Elicited Prejudicial, Inadmissible Hearsay Fell below the Standard of a Reasonably Prudent Attorney.***

Under ER 802, hearsay "is not admissible except as provided by these rules, by other court rules, or by statute." Under ER 801(c) hearsay is defined as follows:

(c) Hearsay. "Hearsay" is a statement, other than one made by

> the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

ER 801(c).

The phrase "other than one made by the declarant while testifying at the trial or hearing" includes an out-of-court statement made by an in-court witness. *State v. Sua*, 115 Wn.App. 29, 60 P.3d 1234 (2003).

In the case at bar there were at least five times during the testimony of three witnesses during which defense counsel failed to object to the introduction of inadmissible, prejudicial hearsay with no tactical reason to justify that failure to object. The first two instances occurred during Detective Blankenship's testimony. The first of these exchanges went as follows:

> A. Nicolas Braghetta shared information with us that was consistent with what was reported by the victim at Catherine's store and provided the same clothing description as the victim at the Catherine's store provided to us as well.
>
> Q. Why was that significant?
>
> A. Because that just led to credibility that, you know, he saw this person in these clothes, and this matches the same description that Catherine's store had provided – victim had provided to us.
>
> Q. Was he able to identify who was wearing those clothes?
>
> A. Yes. He said EJ was wearing those clothes.
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> Q. And did he provide any further information on the identity, or how did – how did you determine who EJ was?

A. We found that little earlier on when Nicolas Braghetta got into the car with his Uncle Marty, and he told him about a conversation he had had with a subject named EJ and what the plans EJ had described to him, what he was going to do.

RP 77-78.

This evidence was objectionable on a number of differt bases. First, it was inadmissible hearsay during which (1) the officer is telling the jury that both Mr. Braghetta and the store clerks had given him descriptions of the clothing the robber wore and that these two accounts were consistent, (2) the officer is telling the jury that Mr. Braghetta had described the clothing the defendant had worn and that this description was consistent with what the store clerk's said, and (3) the officer is telling the jury that someone had told him and fellow officers that Nicholas Braghetta and/or his uncle Marty claimed that the defendant told them about the robbery. This evidence is also objectionable because it gives the officer's opinion on the credibility of witnesses (that, in the officer's opinions, Mr. Braghetta and the store clerks' claims were consistent.)

In addition, the state went on to ask Detective Blankenship about what the defendant's girlfriend had told them when they interviewed her. RP 85. The following given that testimony:

Q. Okay. So what did you do next, if anything?

A. We finished up the search warrant, and I think we secured for the night. No, I'm sorry. Let me think.

No, we did not secure for the night. After that, Detective Jennifer Rice and I went to Wendy's restaurant to talk to Kirkland's girlfriend.

Q. Okay. And without relaying what she said to you, did you learn anything from that interview that aided in your investigation?

A. Yes, I did. I spoke to her outside of the restaurant and back by a dumpster, Detective Rice and I, and what she disclosed to us was she had seen Kirkland with a gun, she described it as not a real gun, and she said her brother had also seen this gun inside the bedroom as well.

RP 85.

This evidence was also inadmissible hearsay (the defendant's girlfriend told me that the defendant had a fake gun). The sole purpose in its presentation was to get the jury to believe the substance of what the girlfriend supposedly said. While the officer's first objectionable statements were at least somewhat blunted by the fact that the defendant could at least cross-examine the witnesses who were claimed to have provided the information that the officer repeated to the jury, in this latter instance even that small help was not present because the state did not call the defendant's girlfriend to testify.

Similarly, during Detective Gundrum's testimony the following exchange took place of direct:

Q. Okay. And what information did you receive from that interview, if anything, that aided in your investigation?

A. He indicated that he had been present during the conversation of several other people and talking about what led up to the robbery.

And then subsequently they went to a Wendy's store in Silverdale, and they actually – when they arrived at that Wendy's, the suspect was standing at the Wendy's as well. So I don't know how much more detail you want me to go into at that point.

Q. Did he lead you to – did he provide you any follow-up information, addresses, names, descriptions, anything that would – that you took into consideration in continuing your investigation after that?

A. He had been – Nicolas had been hanging out with another male named Marty Major at that – at that time, as well as Marty's 15-year-old nephew, and that – the whole conversation about the robbery was between those three. Those three went to the Wendy's together.

Nicolas felt very uncomfortable continuing on. Marty and the 15-year-old and the defendant got into Marty's vehicle, and they drove away. So Nicolas was able to provide us with the vehicle information, the description, the direction of travel, what the suspect was wearing – or the defendant was wearing, those types of things.

Q. And at what point did he make the 911 call?

A. What he explained to me was that he felt in fear of the defendant, didn't want to go with him, understood that there was a gun involved, a robbery. He didn't want to be involved in it. So when the three – when the other three drove away, he went into the Wendy's, feared that the defendant would come back, and he knew that he had a gun. So he ended up walking into a nearby field, and at that point, he made the 911 call.

RP 95-97.

In this case the state was having Detective Gundrum tell the jury what Nicholas Galloway told her about the robbery. In essence, she told the jury that Nicholas Galloway told her that Nicholas Braghetta and his uncle had told him that the defendant had committed the robbery, that he was armed

with a gun, that they knew he still had the gun, that they saw him after the robbery, that they were afraid of him, and that they knew where the defendant was. The only relevant purpose for admitting this evidence was to get the jury to believe the substance of the claims. As such it was inadmissible hearsay.

The third of the investigating officers was Deputy Joseph Hedstrom. RP 122-151. During the state's direct examination of this officer, the state asked him to tell the jury what Nicholas Galloway told him. Once again, Nicholas Galloway did not testify at trial. RP 140. The question and answer were:

> Q. What information was that?
>
> A. He said he was in a vehicle in the TJ Maxx parking lot, learned of the robbery and that the suspect had ran up to Wendy's. They drove up there, and the suspect was standing outside.

RP 140.

The state offered this evidence for the purpose of proving that it was the defendant who committed the robbery and that the defendant then ran over to the Wendy's and was standing there when Nicholas Galloway arrived. As such, this evidence was inadmissible hearsay.

Finally, during his direct evidence Deputy Hedstrom also told the jury that Nicholas Braghetta's uncle gave the Deputy statements that also corroborated his nephew's and Nicholas Galloway's claims that they saw the

defendant after the robbery and gave him a ride. RP 144. This exchange went as follows:

> Q. Okay. And did you receive any information that directed your investigation after that?
>
> A. Yes. Marlin had said he had dropped the suspect and Marty off at a house on McWilliams.
>
> Q. Did you have a name for the other person?
>
> A. At that time, I want to say that he was identified as EJ.
>
> Q. Okay. And were you able – later able to determine who EJ was?
>
> A. Yes.
>
> Q. How did you determine that?
>
> A. Through interviews with Marty and I think Marty's nephew.

RP 144.

In this exchange Deputy Joseph Hedstrom told the jury that Mr. Braghetta, Nicholas Galloway and Mr. Braghetta's uncle had told him that it was the defendant who committed the robbery and that they told him where the defendant was located. Once again, the state introduced theses out of court statements for the purpose of proving the substance of those statements. As such they were inadmissible hearsay.

Although the state presented the evidence of 12 witnesses in this case over a number of days of trial, a critical review of that evidence reveals that

this case boils down to whether or not the jury believed the evidence of Nicholas Braghetta. He was the only witness who claimed to have knowledge that the defendant had committed the robbery. The clerks could not identify the robber and no other witness claimed that the defendant had admitted that he had committed the crime. Given this fact, there was no possible tactical reason to refrain from objecting to the foregoing testimony that was inadmissible hearsay and in some instances inadmissible opinion and vouching claims. All of these statements bolstered the credibility of Nicholas Braghetta. As such, no reasonable attorney would have failed to object to the introduction of any of this evidence.

***(2) Trial Counsel's Failure to Object When the State Called upon its Key Witness to Vouch for His Own Credibility Fell Below the Standard of a Reasonably Prudent Attorney.***

Under Washington Constitution, Article 1, § 21 and under United States Constitution, Sixth Amendment every criminal defendant has the right to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). In order to sustain this fundamental constitutional guarantee to a fair trial both the defense counsel and the prosecutor, as well as the witnesses, must refrain from any statements or conduct that express their personal belief as to the credibility of a witness or as to the guilt of the accused. *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956). If there is a "substantial likelihood" that any such conduct, comment,

or questioning has affected the jury's verdict, then the defendant's right to a fair trial has been impinged and the remedy is a new trial. *State v. Reed*, 102 Wn.140, 684 P.2d 699 (1984).

For example, in *State v. Denton*, 58 Wn.App. 251, 792 P.2d 537 (1990), the defendant was charged with two counts of bank robbery. At trial he admitted the crimes, but claimed he acted under threat of death from a person named Walker. When this Walker was called to testify he admitted to previously beating the defendant, but he denied having threatened to have the defendant killed if he did not perform the robberies. Following this testimony, the defense proposed to cross-examine Walker concerning statements he made while in prison to a cell-mate named Livingston in which he admitted to Livingston that he had threatened to kill the defendant if he did not perform the robberies.

However, when Livingston was examined outside the presence of the jury he refused to testify concerning his conversation with Walker as he didn't want to be labeled a "snitch." Although the court gave Livingston an 11 month sentence for contempt it refused to allow defense counsel to cross-examine Walker concerning his admissions to Livingston. Following verdicts of guilty the defendant appealed arguing that the trial court erred when it refused to allow the offered cross-examination of Walker.

In rejecting the defendant's claim, the Court of Appeals stated the

following.

> Asking these questions would have permitted defense counsel to, in effect, testify to facts that were not already in evidence. Counsel is not permitted to impart to the jury his or her own personal knowledge about an issue in the case under the guise of either direct or cross examination when such information is not otherwise admitted as evidence. *See State v. Yoakum*, 37 Wash.2d 137, 222 P.2d 181 (1950).

*State v. Denton*, 58 Wn.App. at 257 (citing *State v. Yoakum*, 37 Wn.2d 137, 222 P.2d 181 (1950).

Similarly in *State v. Yoakum, supra*, the defendant was charged with Second Degree Assault out of an incident in which the defendant knifed another person during a fight outside a bar. At the trial the defendant testified and claimed self defense. During cross-examination the prosecutor repeatedly impeached the defendant with a transcript of a taped conversation the defendant made to the police. However, the prosecutor never did offer either the transcript into evidence or call the officer to testify concerning the statement.

Following conviction the defendant appealed, arguing that he was denied a fair trial because of the prosecutor's repeated reference during cross-examination to evidence within the personal knowledge of the prosecutor was never made part of the record. In setting out the law on this issue, the Washington Supreme Court relied upon and quoted extensively from the Arizona Supreme Court's decision in *Hash v. State*, 48 Ariz. 43, 59 P.2d 305

(1936).

In *Hash* the defendant appealed his conviction for statutory rape, arguing that the trial court had erred when it allowed the prosecutor to cross-examine a witness concerning inconsistent statements the witness had previously made to the prosecutor in his office in front of another deputy prosecuting attorney. The Arizona Supreme Court stated the following concerning the state's impeachment of the witness.

> It can at once be seen that these questions must have been damaging to the defendant. Back of each was the personal guarantee of the county attorney that Edgar had stated to him all the things assumed in the question. In other words, it was as though the county attorney had himself sworn and testified to such facts. Not only was his personal and official standing back of these statements, but he called in to corroborate him Ed Frazier, deputy county attorney, a lawyer of high standing for integrity and ability. These questions were not put, as the court assumed as a basis for impeachment. Their certain effect was to discredit the witness J. A. Edgar. The county attorney, if he knows any facts, may, like any other witness, be sworn and submit himself to examination and cross-examination, but he may not obtrude upon the jury and into the case knowledge that he may possess under the guise of cross-examination, as in this case.
>
> * * *
>
> To give sanction to the manner in which the prosecution conducted the cross-examination of defendant's witness J. A. Edgar would establish a precedent so dangerous to fair trials and the liberties of our citizens that we feel for that reason alone the case should be retried.

*State v. Yoakum*, 37 Wn.2d 142-143 (quoting *Hash v. Arizona*, 59 P.2d at 311).

In *Yoakum* the Washington Supreme Court went on the reverse the defendant's conviction, stating as follows.

> A person being tried on a criminal charge can be convicted only by evidence, not by innuendo. The effect of the cross-examination as conducted by the deputy prosecutor was to place before the jury, as evidence, certain questions and answers purportedly given in the office of the chief of police, without the sworn testimony of any witness. This procedure, followed with such persistence and apparent show of authenticity was prejudicial to the rights of appellant.

*State v. Yoakum*, 37 Wn.2d at 144.

In the case at bar the defense spent the majority of its cross-examination of Nicholas Braghetta challenging his credibility by examining him concerning prior contrary statements as well as false statements he gave to the police. In response, the prosecutor specifically asked Mr. Braghetta to tell the jury whether or not he was telling the truth. This exchange went as follows:

> Q. Nick, is it easier for you to remember the truth or to remember a lie?
>
> A. It's easier to remember the truth.
>
> Q. Okay. So you don't remember everything that you told law enforcement that night; is that right?
>
> A. Uh-huh.
>
> Q. And you testified that – that some of it was a lie?
>
> A. Yeah.
>
> Q. But you remember the facts that you testified to today?

A. Yeah.

Q. And is what you told us today the truth?

A. Yes.

RP 197.

By asking its chief witness to comment on his own credibility and tell the jury that he was telling the truth the prosecutor elicited evidence that violated the defendant's right to a fair trial. There is no legal basis for asking such a question and no possible tactical reason for defense counsel to fail to object. This is particularly so because the state could not sustain a robbery conviction against the defendant without the testimony of Nicholas Braghetta. Thus, trial counsel's failure to object fell below the standard of a reasonable prudent attorney, just as did trial counsel's failure to object to the state's repeated invitations to have the investigating officers repeat harmful, inadmissible hearsay and opinion evidence.

***(3) Trial Counsel's Failures to Object When the State Elicited Inadmissible, Prejudicial Hearsay and When the State Invited its Key Witness to Comment on His own Credibility Undermine Confidence in the Jury's Verdict and Thereby Denied the Defendant Effective Assistance of Counsel.***

As was set out in the preceding arguments, counsel's errors falling below the standard of a reasonable prudent attorney constitute ineffective assistance of counsel if "there is a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A

reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v. Kinchelse*, *supra* (citing *Strickland*, *supra*). As the following explains, in this case counsel's errors are more than sufficient to undermine confidence in the outcome of the trial.

As was previously stated, the case at bar devolves down to an issue of the credibility of Nicholas Braghetta's claim that the defendant committed the crime. A careful review of the evidence in this case persuasively indicates that his claims were not believable for three reasons. The first of these two reasons lies in the sheer unlikelihood of his claim. According to Mr. Braghetta, on the night in question a perfect stranger walks up to him at a McDonald's, shows him a gun either fake or real, tells Mr. Braghetta that he is going to commit an armed robbery and then invites him along to watch. Had the two of them been friends, or at least passing acquaintances Mr. Braghetta's claim might make a little sense. However, for a perfect stranger to walk up to another and invite that other person to watch the stranger commit a violent crime strains credulity to the breaking point.

Second, and perhaps even more persuasive, is that fact that Leslie Kitt and Tricia Nace's testimony essentially excludes the defendant as the robber. Ms Kitt's testimony was that the robber was five foot five inches tall, which was just five inches taller than she is. The most she would vary on this estimate was a couple inches either shorter or taller. She was specific that

she only looked up to him slightly. Ms Nace corroborated this evidence. While on the witness stand she stated that the robber was just a few inches taller than Ms Kitt's five foot zero inchs height. Both of these women had worked for a number of years at a women's clothing store helping fit all sizes and heights of women to clothing and clothing to women. If any two witnesses were well situated to identify the height of the robber they were.

By contrast, the "Defendant Identification Information" given on both the original and amended informations gives the defendant's height: five foot ten inches tall. This evidence strongly contradicts Mr. Braghetta's claim that it was the defendant who committed the robbery.

Third, in this case the state took pains to (1) have Ms Kitt testify that the robber was wearing gloves, (2) have one of the officers testify that he found gloves in the defendant's bedroom in a laundry basket, and (3) then introduce those gloves into evidence. However, what the state did not do was show the gloves to Ms Kitt and ask her in front of the jury if those appeared to be the gloves the robber was wearing. The state's failure to take this step indicates that the answer to any such question was probably in the negative. Even a "maybe" or an "I don't know" from Ms Kitt would have been preferable to the state's failure to ask the question.

Although the state might concede each of the preceding arguments, a probable rejoinder would be the argument that in spite of the deficiencies

in the state's evidence the jury ultimately did choose to believe Nicholas Braghetta's claims. Obviously the jury found him sufficiently credible to convict the defendant. However, herein lies the prejudice that arose from the defense attorney's failure to object to the introduction of inadmissible hearsay that corroborated Nicholas Braghetta's claims of five separate occasions, as well as defense counsel's failure to object when the state had Nicholas Braghetta tell the jury that while he had lied in the past, he was telling them the truth today. Given the equivocal nature of the state's evidence in this case, these failures to object do undermine confidence in the jury's verdict. As a result, trial counsel's failures to object did deny the defendant effective assistance of counsel in this case. Consequently this court should reverse the defendant's conviction for robbery and remand for a new trial.

**II. THIS COURT SHOULD NOT IMPOSE COSTS ON APPEAL.**

The appellate courts of this state have discretion to refrain from awarding appellate costs even if the State substantially prevails on appeal. RCW 10.73.160(1); *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 382, 367 P.3d 612, 613 (2016). A defendant's inability to pay appellate costs is an important consideration to take into account when deciding whether or not to impose costs on appeal. *State v. Sinclair, supra.* In the case at bar the trial court found Jesse Wilkins

indigent and entitled to the appointment of counsel at both the trial and appellate level. CP 3, 165-166. In the same matter this Court should exercise its discretion and disallow trial and appellate costs should the State substantially prevail.

Under RAP 14.2 the State may request that the court order the defendant to pay appellate costs if the state substantially prevails. This rule states that a "commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." RAP 14.2. In *State v. Nolan*, *supra*, the Washington Supreme Court held that while this rule does not grant court clerks or commissioners the discretion to decline the imposition of appellate costs, it does grant this discretion to the appellate court itself. The Supreme Court noted:

> Once it is determined the State is the substantially prevailing party, RAP 14.2 affords the appellate court latitude in determining if costs should be allowed; use of the word "will" in the first sentence appears to remove any discretion from the operation of RAP 14.2 with respect to the commissioner or clerk, but that rule allows for the appellate court to direct otherwise in its decision.

*State v. Nolan*, 141 Wn. 2d at 626.

Likewise, in RCW 10.73.160 the Washington Legislature has also granted the appellate courts discretion to refrain from granting an award of appellate costs. Subsection one of this statute states: "[t]he court of appeals,

supreme court, and superior courts ***may*** require an adult offender convicted of an offense to pay appellate costs." (emphasis added). In *State v. Sinclair*, *supra*, this Court recently affirmed that the statute provides the appellate court the authority to deny appellate costs in appropriate cases. *State v. Sinclair*, 192 Wn. App. at 388. A defendant should not be forced to seek a remission hearing in the trial court, as the availability of such a hearing "cannot displace the court's obligation to exercise discretion when properly requested to do so." *Supra.*

Moreover, the issue of costs should be decided at the appellate court level rather than remanding to the trial court to make an individualized finding regarding the defendant's ability to pay, as remand to the trial court not only "delegate[s] the issue of appellate costs away from the court that is assigned to exercise discretion, it would also potentially be expensive and time-consuming for courts and parties." *State v. Sinclair*, 192 Wn. App. at 388. Thus, "it is appropriate for [an appellate court] to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellate brief." *State v. Sinclair*, 192 Wn. App. at 390. In addition, under RAP 14.2, the Court may exercise its discretion in a decision terminating review. *Id.*

An appellate court should deny an award of costs to the state in a criminal case if the defendant is indigent and lacks the ability to pay.

*Sinclair, supra*. The imposition of costs against indigent defendants raises problems that are well documented, such as increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration. *State v. Sinclair*, 192 Wn.App. at 391 (citing *State v. Blazina, supra*). As the court notes in *Sinclair*, "[i]t is entirely appropriate for an appellate court to be mindful of these concerns." *State v. Sinclair*, 192 Wn.App. at 391.

In *Sinclair*, the trial court entered an order authorizing the defendant to appeal *in forma pauperis,* to have appointment of counsel, and the have the preparation of the necessary record, all at State expense upon its findings that the defendant was "unable by reason of poverty to pay for any of the expenses of appellate review" and that the defendant "cannot contribute anything toward the costs of appellate review." *State v. Sinclair*, 192 Wn. App. at 392. Given the defendant's indigency, combined with his advanced age and lengthy prison sentence, there was no realistic possibility he would be able to pay appellate costs. Accordingly, the Court ordered that appellate costs not be awarded.

Similarly in the case at bar, the defendant is indigent and lacks an ability to pay. First, the trial court found the defendant indigent and unable to pay the costs of either the trial or the appeal. Second, the defendant's age and status as a convicted violent offender who is addicted to drugs indicates

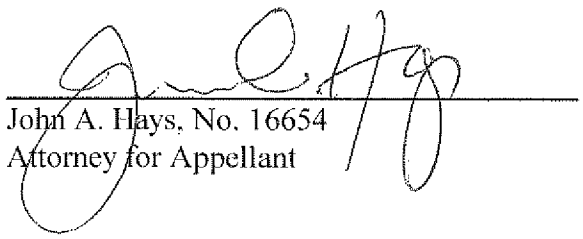
that he has no resources with which to support himself, nor will he. Given these factors, it is unrealistic to think that the defendant will be able to pay appellate costs. Thus, this court should exercise its discretion and order no costs on appeal should the state substantially prevail.

## CONCLUSION

Trial counsel's failure to object to the admission of inadmissible evidence that improperly bolstered the testimony of its crucial witness denied the defendant effective assistance of counsel. As a result, this court should vacate the defendant's conviction for robbery and remand for a new trial. In the alternative, this court should not impose costs on appeal if the state substantially prevails.

DATED this 27th day of July, 2016.

Respectfully submitted.



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## APPENDIX

### WASHINGTON CONSTITUTION
### ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

### UNITED STATES CONSTITUTION,
### SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**COURT OF APPEALS OF WASHINGTON, DIVISION II**

| | |
|---|---|
| **STATE OF WASHINGTON,**<br>**Respondent,**<br><br>**vs.**<br><br>**RICHARD KIRKLAND,**<br>**Appellant.** | **NO. 48798-5-II**<br><br>**AFFIRMATION OF SERVICE** |

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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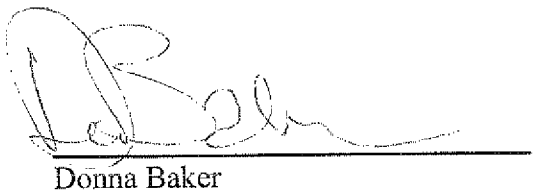
Dated this 27th of July, 2016, at Longview, WA.



Donna Baker

# HAYS LAW OFFICE

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